Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	CG Docket No. 02-278

COMMENTS OF STEVE KIRSCH IN REPLY TO THE NOTICES OF EX PARTE PRESENTATIONS

I am a serial entrepreneur based in Silicon Valley. I have founded six high technology companies in the computer field. I am also the creator of junkfax.org. I have been involved in tracking in pursuing TCPA violators since 2001 including tracking and confiscating one of fax.com's RoboCall dialers that was used to illegally dial my office phone. I have also testified before Congress on the TCPA.

An important aspect of dialers, including "predictive dialers," appears to have been omitted from various industry presentations in this docket—an undeniable capacity to easily dial random or sequential numbers.

Some business use predictive dialers to store lists of numbers rather than have the dialer utilize a capacity to generate such numbers itself. What industry filers have not told the Commission is that it is quite simple for someone to generate a list of random or sequential telephone numbers, and to then load that list into a predictive dialer. This capacity is always present in predictive dialers, since every dialing system, including predictive dialers, must either 1) create its own list of numbers or 2) be loaded with a list of numbers. Assuming that a particular dialer lacks what others (who support Communication Innovators' ("CI's") pending

Petition for Declaratory Ruling) call a "present" capacity to generate telephone numbers, such a dialing device also ***by definition*** lacks any "present" capacity to call ***any*** number until a list of numbers is loaded. Ergo, the device is a useless piece of equipment, that is nonfunctional for dialing unless and until someone connects it to a source of phone numbers. Generating the list of numbers is integral to the dialer operation.... the dialing process can not proceed without that element. This is one reason why "present" capacity fails as a distinguishing characteristic for any system that accepts a list of numbers. It also shows the wisdom of Congress, that *expressly* intended the term ATDS to be construed broadly. H.R. Rep. No. 633, 101st Cong., 2nd Sess. (1990).

Moreover, once a dialer is loaded with a list of numbers, that dialer then proceeds through that list, and the list itself is the source of the random or sequential numbers. This is, by definition, a random or sequential number generator.[1] As a computer expert and programmer, I often use files of such numbers as a source for repeatable and sequential random numbers.

I also wish to point out that it is impossible to "store" telephone numbers "using a random or sequential number generator." To apply the clause "using a random or sequential number generator" to both the terms "store" and "produce" is ¶227(1)(A) is obviously wrong. The most straightforward interpretation (and the only one that makes sense) is one that means a device that has the capacity to either use random or sequential number generator to produce telephone numbers to be called, or the capacity to store such telephone numbers that were produced using a random or sequential number generator. This interpretation also prevents the evasion that has been enabled by huge capacity increases since the early days of dialers, since

[1] Technically, it would be pseudo-random from the standpoint of mathematics, since true

today the entire list of all telephone numbers in North America can be loaded onto a dialer—there is no longer a need for the dialer itself to "generate" the numbers.... only to store them or accept them from an external source. They are still "the buckets enchanted by the Sorcerer's Apprentice"[2] moving automatically from number to the next number.

The smart-phone red herring.

Some have suggested that the Commission's equating of a predictive dialer with an ATDS would render a smart-phone with a dialing application do be an ATDS. Indeed, it would but this red herring is neither unintended, unwarranted, nor unsound. The power and capacity of a modern smart-phone easily exceeds that of the first generation of predictive dialers. Bulk automated calls from an iPhone are just as violative as bulk automated calls from a commercial dialer.[3] Put another way, if someone is using an iPhone to make autodialed calls without express consent "like the buckets enchanted by the Sorcerer's Apprentice" *(i.e., without human intervention*) to cell phones, then they are violating the TCPA.

What distinguishes the (typical) use of an iPhone from the (typical) use of a predictive dialer, is the iPhone involves human interaction to dial each phone number.[4] This demonstrates the wisdom of the Commission's existing guidance—a bright-line test rather than try to predicate the interpretation of an ATDS on technicalities that can be exploited by creating purpose-built

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randomness is elusive.

2 *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 639 (7th Cir. 2012).

3 There are multiple autodialer applications for iPhones. See, e.g., https://itunes.apple.com/us/app/otto-the-autodialer/id460951213?mt=8 ("Otto Autodialer"); https://itunes.apple.com/app/id288947187?mt=8 ("iDialUDrive").

4 Another distinction would be a likely personal relationship (and attendant TCPA exemption) when calling someone from your personal cell phone.

devices to evade the application of a "technical" rule. The more sound policy is to accept that all such dialing devices are an ATDS based on capacity that is enabled "when used in conjunction with other equipment"[5] but continue the Commission's existing guidance under §227(b)(2)(C) that what matters is whether meaningful human intervention is actually used to dial each individual non-solicitation autodialed (but not prerecorded) call.[6] That is still a good—and practical—application of the Commission's interpretive authority.[7] It excludes the smart phone user unless the phone is being used to make calls automatically "without human intervention." It excludes "speed dialing" which only dials one number at a time since it uses direct "human intervention" for each call. This also excludes the predictive dialer user (or any other ATDS) if the dialer is being used to make calls automatically with direct human intervention for each call. It applies to everyone equally.

This construction also would eliminate "abandons" to cell phones,[8] since requiring the

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5 H.R. Rep. No. 633, 101st Cong., 2nd Sess. (1990).

6 Solicitation calls are prohibited by other provisions of the TCPA and TSR.

7 This is also consistent with the Commissions guidance back to the original TCPA order in 1992, that devices implementing "speed dialing" are not the target of the TCPA. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752 ¶ 47 (1992) (Report and Order). Speed dialing, however, is not predictive dialing which dials multiple numbers without human intervention. Speed-dialing only dials one number at a time in response to human intervention of the caller to dial each number.

8 The Commission should at the same time, make clear that abandons to cell phone numbers are prohibited, and the so-called "safe harbor" from Commission enforcement action for abandoned calls is only applicable to land-line calls where and where the called party is not charged for the call. If abandons were permitted to cell phones, creative evasions could be developed by dialer operators to have "human intervention" but still dial predictively – such as have their agents click on 3 phone numbers in rapid succession, and then take the first that answers and abandon the others. Or a creative dialer operator could still dial predicatively, by employing a separate person to simply click on 10 phone numbers a second to dial them for a room full of agents using the dialer.

human intervention for each individual dialing attempt would require the telephone agent to be already available to talk to the called party before dialing.[9] It would address the singular "benefit" to the consumer that the industry touts—minimizing misdialed numbers.[10] This approach satisfies one of the most important precept of consumer protection law:

> the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

Construing ATDS broadly or narrowly is largely a policy choice that is properly left to the discretion of the Commission as long as it is not arbitrary or capricious. The Commission's existing guidance is already given "great deference" by the courts. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971); *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984). "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.*, 467 U.S. at 843, n 11 (additional citations omitted).

The Commission's existing guidance is solidly within its discretion. No petitioner or commenter has identified any sound basis compelling the Commission to change its existing guidance. Instead, they make impassioned pleas for a *policy* change based largely on their

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9 This is known as "preview mode" dialing.

10 The Commission should also address with specific language that attempted evasions of a requirement for meaningful human interaction will not be permitted. *See Comments of Robert Biggerstaff Opposing the Petitions for Reconsideration of Pace, Marketlink, and Satcom*, Oct. 12, 2012, at note 6 and accompanying text identifying such evasions already being implemented in similar contexts.

perception of the TCPA as an impediment to their rapacious desire to make millions of robot-dialed cell phone calls a day. Their burden of persuasion for such a radical policy change simply has not been met.

The Pervasive Blindness in the *ex Parte* Presentations.

I have read many of the *ex parte* notices, and the takeaway from that body of filings is that there appears to be willful blindness to obvious solutions. For example, the notice filed by counsel for Communications Innovators,[11] identifies a laundry list of potential types of autodialed calls it contends are to be made to cell phones with predictive dialers, to which it claims the TCPA stands as an impediment. Addressing each one in turn:

> Healthcare. Appointment reminders, follow-up appointment and exam scheduling, preoperative instruction calls, prescription reminders, lab result discussions, post-discharge follow-up communications intended to prevent readmission, home healthcare instructions.
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> Financial Services. Identity theft and fraud prevention alerts, breach notifications, out-of pattern activity alerts, customer service and general account notifications, funds transfer confirmations, anticipatory fee avoidance calls (including low balance, overdraft, over-the limit, and late payment alerts), outreach calls to help customers avoid mortgage default and explore mortgage modification options, calls to consumers behind on other credit obligations to explore alternative payment options and avoid fraudulent for-profit debt settlement companies.
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> Education. Student correspondence, class registration and cancellation alerts, financial aid communications, missed payment and pre-default correspondence, school or building closing notifications.
>
> Transportation. Flight delay or cancellation notifications.
>
> Insurance. Impending policy lapse notifications, notifications of imminent catastrophe, calls with information about how and where to file a claim.

All of these examples are calls made to existing clients with whom the caller would have had

11 While the filing of Communications Innovators is used as an example, this issue is a common

direct contact. Since the caller has (presumably) obtained the phone number of their client directly from the client, they are obviously able to secure express consent to make autodialed or prerecorded calls to that number—and the client is then given the opportunity to say "no."[12] Why can they not make those calls with meaningful "human intervention" so a live person make the call, and is there to immediately talk to the recipient? Indeed, in my interactions with many companies, such as health-care providers, banks, insurance companies, retailers, etc., businesses have often presented me opportunities to accept or decline contact separately by autodialer, recorded message, e-mail, or text message. Why are certain bad actors in the industry so intent on *forcing* these calls on consumers (which millions of consumers have to pay to receive)[13] without human intervention to make each call, rather than having the common decency to simply ask permission at the same time they ask the party for their phone number?

> Other Consumer Protection and Safety Calls. Product recalls, disaster notifications for utility outages and upcoming service interruptions

All of these examples are also calls made to existing clients with whom the caller would have had direct contact where express consent could have been obtained. Many of these calls would also qualify for the statutory exemption for emergency purposes.

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thread among many of the industry filings.

12 This illustrates another negative aspect of the varying petitions—they seek to have predictive dialers excluded from the definition of ATDS, which would mean that even if a consumer intentionally withheld their cell phone number from a business, specifically so the business could not make calls to their cell phone, such a business can still call that consumer by "obtaining" that consumer's cell phone number from a third party (such as Accurant, Infogroup, etc.) if the petitions were granted.

13 I recently spoke with an industry leader in analysis of consumer data regarding cell phone plans, and she informed me that the percentage of consumers with unlimited cell phone plans is currently *decreasing* and that trend is accellerating.

Similar lists of call types are common to other industry filers on this docket supporting the petitions. None of them present any reason why express consent can not simply be acquired from the called party. As a database architect and computer expert, I have dealt with many companies that maintain customer databases with explicit fields for recording contact preferences such as whether the business has permission to call a cell phone number with an autodialer.

I propose one question to each proponent urging the Commission grant these petitions: "What call do you want to make and to whom, where you are currently prevented from either 1) simply asking the called party for express consent (which has to clearly and conspicuously inform the consumer of the type and nature of the call being consented to) to make such calls before making them or 2) making the calls with a predictive dialer in preview mode, with meaningful human intervention to dial each call?" Such a procedure is the defacto best practices recommended by well-respected counsel:

> So what's an attorney or in-house compliance or privacy officer to do? First, try always to obtain prior express written consent at the time a debt is created and make certain to state clearly at that time exactly what it is that the customer is consenting to. Anything other than unambiguous language could impact an entity's ability to rely on such consent as an affirmative defense in any subsequent litigation.
>
> Use a disclosure such as, "by signing here and disclosing your mobile telephone number, you are agreeing that we or our agents or contractors can call you on that number using an automatic telephone dialer and/or that we or our agents or contractors can leave a prerecorded and/or text message on that number." Then, once you get prior express written consent to a clearly articulated disclosure, make sure that you keep good, admissible records of how, when, and from whom you received the consent.[14]

Similar recommendations have been part of industry guidance from many different sources.

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14 *Reed Smith Client Alert* , <http://www.reedsmith.com/In-the-Continuing-Saga-of-the-TCPA-Good-News-Bad-News-From-a-Court-in-Miami-05-22-2013> (last visited June 27, 2013) (emphasis added).

Mere release of a cell phone number is not "express consent" to receive autodialed or prerecorded calls at that number.

Some have suggested that merely giving your cell phone number to a business constitutes "express consent" to be called at that number by that business, using any device the business wants to use (including autodialers and robocalls). Such an interpretation does great violence to the words of the statute, by making the word "express" superflous or worse—conflating it with its own antonym of "implied." Such an interpretation would likely incur challenge from an array of consumer groups as arbitrary and capricious. Courts have already rejected similar constructions of the term "experss consent" in the TCPA.[15]

Moreover, such a construction would force consumers into a Hobson's choice:[16] surrender to unlimited autodialed calls to their cell phone, or withhold their phone number from a business to prevent such calls and then remain unable (as a practical matter, not legally) to be contacted by that entity via phone at all—even in an emergency and even by a TCPA complaint call made with human intervention to make each call.

There is a disturbing trend of businesses that refuse to do business with consumers unless

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15 *See, e.g., Mais v. Gulf Coast Collection Bureau, Inc.*, 2013 WL 1899616 (S.D. Fla. May 8, 2013) ("The FCC's construction is inconsistent with the statute's plain language because it impermissibly amends the TCPA to provide an exception for 'prior express or implied consent.' Congress could have written the statute that way, but it didn't. And because it didn't, the FCC's contrary construction is not entitled to deference.")

16 This predicament has been exacerbated by lack of Commission guidance making clear that consumers have the explicit right to orally require a caller to stop calling their cell phone, even if that consumer did give express consent to calls to their cell phone from that caller at some point in the past. This right was expressly recognized for calls to land-lines. 7 FCC Rcd. 8752, ¶31 (by giving "instructions to the contrary"). However, some entities making calls to cell phones have claimed the TCPA is a cell phone equivalent of "Hotel California" where once you open your cell phones to such calls, you can never stop them—even if you have to pay to receive them.

the consumer surrenders a phone number.[17] Phone and cable companies often refuse to even come install or repair your service unless you give them your phone number. No one can open a bank or credit card account without surrendering their phone number. Websites and order forms attempt to obtain adhesive consent for autodialed and prerecorded calls to cell phones by burying ambiguous language in multipage terms of service in mice-type. Compelled disclosure of a phone number as a condition of doing business or burying ambiguous "consent" language in boilerplate do not constitute "express" consent under *any* circumstances.

The TCPA's provisions in question apply equally to "telemarketing" and "non-telemarketing" calls.

Many of the recent *ex parte* presentations on this docket try to draw a distinction between "telemarketing" and other types of calls, and (wrongly) try to paint the TCPA as a law concerned only with "telemarketing" and thereby suggest that the regulation of non-telemarketing calls is accidental or unintended. Nothing could be farther from the truth. The provisions of the TCPA at §227(b)(1)(A) apply to **all calls regardless of content**. Congress segregated telemarketing calls from other calls in some *other* provisions of the TCPA, but it did not do so in §227(b)(1)(A). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987).

Objection to Confidential Filing of Communication Innovators

Communication Innovators filed a "confidential" *ex parte* notice on this docket dated

[17] As several filings have noted, many consumers are now cell-phone-only households, so must—as a condition of doing business—surrender their cell phone numbers to numerous businesses or do without services like cable television.

May 10, 2013. It seems impossible that an *ex parte* notice could conceivably be confidential in its entirety. The Commission should rigorously scrutinize any claim of "confidentiality" particularly when it comes to an *ex parte* notice. The Commission should release, or require Communication Innovators to refile and release, all pertinent information that is not legitimately "confidential" under existing Commission standards.

CONCLUSION

The Commission should carefully scrutinize the one-sided presentations of digital highwaymen who consider consumers' pervasive connectivity with cell phones as part of "the new oil" to be exploited.[18] The Commission should protect consumers from exploitation of their privacy that is considered simply a raw material by others.

I urge the Commission to deny these petitions seeking to weaken the consumer protections in the existing administration of the TCPA's regulation of ATDS. All predictive dialers are currently an ADTS under the TCPA and have been so under the Commission's guidance for many years. The Commission should reiterate the existing guidance that all dialing devices that automatically progress and dial the next number or next number fed to it automatically, are an ADTS, and the bright-line test for the safe harbor is the one already articulated—that meaningful "human intervention" must be required for each non-solicitation call made by a device that calls cell phone numbers (so long as the recipient is not charged for the call). To balance this "meaningful human intervention" safe harbor for §227(b)(1)(A)(iii)[19]

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18 *Is Data The New Oil?*, Forbes, <http://www.forbes.com/sites/perryrotella/2012/04/02/is-data-the-new-oil/ (last visited Oct. 18, 2012).

19 Note that the Commission lacks authority under §227(b)(2)(C) to exempt any call from §227(b)(2)(A)(iii) where the called party is charged for the call, so any safe harbor would have to

however, callers must abide by do-not-call requests when calling cell phones regardless of the type of call (other than emergency purposes), including when making calls that are purportedly "informational" calls.[20]

I also caution the Commission to beware of unintended consequences. Any change in the administration of the TCPA regarding an ATDS will not be limited to predictive dialers—it will also apply to SMS text messages and potentially other message platforms. In particular, text message senders (and text spammers) have more options than predicative dialers for designing purpose-built devices to avoid any technical definitions.

On a related note, the Commission did a great public service last year, when it released an Enforcement Advisory[21] that correctly and precisely reiterated specific application of the TCPA's provisions to political robocalls. The clarity of that document was well received and I believed prevented millions of illegal robocalls by eradicating perceived ambiguities and "willful ignorance" by some who would have made those calls absent the Commission's advisory. In contrast, I noted that some of the *ex parte* presentations and other filings on this docket contained facially inaccurate representations of the TCPA's provisions. I also frequently see industry articles and even guidance from law firms practicing in this field that make facially incorrect statements about the application of the TCPA to particular calls, faxes, or text messages. I encourage the Commission to release "plain English" guidance similar to the 2012 Enforcement

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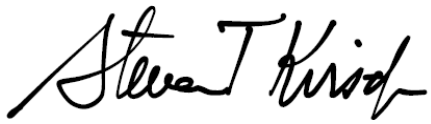
reflect this limit on Commission authority. The Commission recognized this when it created the safe harbor for calls to cell phones by the cell phone carrier itself when placing calls to customers, so long as the customer was not charged.

20 This is consistent with the fact that §227(b)(1)(A)(iii) applies to all calls regardless of content. Any safe harbor must respect a consumer's direct do-not-call request.

21 Enforcement Advisory No. 2012-06.

Advisory that leaves no ambiguity as to the specific application of each provision of the TCPA to each type of call, fax, and text message.

Respectfully submitted, this the 27th day of June, 2013.



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